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In the Supreme Court of the United States

OCTOBER TERM, 1920

R. E. KENNINGTON, ET AL.,
Plaintiffs in Error

V.

A. MITCHELL PALMER, ET AL.,
Defendant in Error

BRIEF FOR PLAINTIFFS IN ERROR.

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BRIEF FOR THE PLAINTIFFS IN ERROR

Upon the 3rd day of May, 1920, the plaintiffs in error exhibited their original bill of complaint in the District Court of the United States for the Southern District of Mississippi, at Jackson, Mississippi, against A. Mitchell Palmer, Attorney General of the United States; H. E. Figg, Fair Price Commissioner of the United States; T. J. Locke, Fair Price Commissioner of the State of Mississippi; S. J. Taylor, Fair Price Commissioner for the City of Jackson, Mississippi; Julian Alexander, United States District Attorney for the Southern District of Mississippi, and his Assistant, H. M. Fulgham.

The original bill of complaint alleged, among other things, the following facts:

(1) That the complainants, R. E. Kennington, R. E. Kennington Company, and the Union Department Store, the last two mentioned complainants being corporations domiciled at Jackson, Mississippi, owned and operated department stores in the State of Mississippi, known as the R. E. Kennington Company and the Union Department Store, situated in Jackson, Mississippi, and R. E. Kennington individually, operating a department store in Yazoo City, Yazoo County, Mississippi, the said R. E. Kennington owning the majority of the stock and being the executive head of the two last mentioned corporations; that these corporations were engaged in selling merchandise throughout the State of Mississippi, at retail and at wholesale; that such businesses had been conducted for a long period of time, and had been continuously operated upon a fairly remunerative basis.

(2) That in order to conduct the business of complainants it was necessary to maintain a large force of employees, to own and equip store buildings, to maintain offices in the City of New York, and in the City of Paris, France, to incur large obligations for borrowed money, and for merchandise purchased on credit in the usual course of business; and that it was necessary for the complainants to have and maintain a first-class credit rating.

(3) That the complainants bought and sold, among other articles, what is known as "wearing apparel;" and that in handling wearing apparel they studied, and anticipated and endeavored to satisfy the tastes, whim, caprices of their customers, all of which required large investment, time and money; and that by strict attention and efficient management of the business they have built up a reputation as vendors of high grade merchandise, as well as a reuptation for fair and honest dealing, and had acquired the good-will of the public, which was a part of their property.

(4) That growing out of the world war, there had been a great increase in the prices of necessaries of life and of all kinds of commercial commodities, and especially wearing apparel. The bill of complaint alleged that such state of facts had arisen from:

(a) An inflated currency.

(b) The diversion of the producing man power of the country into war time activities;

(c) The lack of importation of foreign labor into the country, and the reduction in production occasioned thereby;

(d) The enormous demands for all kinds of food stuffs, wearing apparel, etc., growing out of the world war, as well as the reckless expenditure of money incident thereto.

(5) That for the avowed purpose of reducing prices, especially upon necessities of life, including wearing apparel, upon the 22nd day of October, 1919, the Congress of the United States amended Section 1 of the Lever Act of August 10, 1917, making the same to read as follows:

"That by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the army and navy, to assure an adequate supply and equitable distribution, and to facilitate the movement of foods, feeds, wearing apparel, containers primarily designed or intended for containing foods, feeds or fertilizers; fuel, including fuel oil and natural gas, and fertilizer and fertilizer ingredients, tools, utensils, implements, machinery and equipment required for the actual production of foods, feeds and fuel, hereafter in this act called necessaries; to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulation and private controls affecting such supply, distribution and movement; and to establish and maintain governmental control of such necessaries during the war. For such purposes, the instrumentalities, means, methods, powers, authorities, duties, obligations and prohibitions hereinafter set forth, are created, established, conferred and prescribed. The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this act."

And that Section 4 of the Act of August 10, 1917, was amended to read as follows:

"That it is hereby made unlawful for any person wilfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to permit waste or wilfully to permit preventable deterioration of any necessaries in or in connection with their productions, manufacture or distribution; to hoard, as defined in Section 6 of this Act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate of charge in handling

or dealing in or with any necessaries; to conspire, combine, agree or arrange with any other person, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries; (d) to prevent, limit or lessen the manufacture or production of necessaries in order to enhance the price therefor; or (e) to exact excessive prices for any necessaries, or to aid or abet the doing of any act made unlawful by this Section. Any person violating any of the provisions of this section, upon conviction thereof, shall be fined not exceeding $5,000.00, or be imprisoned for more than two years, or both: Provided that this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturists with respect to the farm products produced or raised upon land owned, leased or cultivated by him; Provided, further, that nothing in this Act shall be construed to forbid or make unlawful collective bargaining by any co-operative association or other association of farmers, dairymen, gardeners, or other producers of farm products produced or raised by its members upon lands owned, leased or cultivated by them."

(6) That no regulations have been made and no orders issued either by or for the President, or otherwise, in respect to the sale of weraing apparel; that no prices, rates, or charges whatsoever have been fixed either by the President, or on his behalf, by any official person or agency whatsoever;

(7) That the defendant, H. E. Figg, assuming to act as United States Fair Price Commissioner, had appointed the defendant, T. J. Locke, as State Fair Price Commissioner for the State of Mississippi; and that he, in turn, had appointed the defendant S. J. Taylor as Fair Price Commissioner for the City of Jackson, in the First Judicial District of Hinds County, Mississippi;

(8) That the said Fair Price Commissioner for the State of Mississippi had proclaimed and issued the following proclamation in respect to the sale of wearing apparel in the State of Mississippi:

"Fair Price Committees are advised that the Commissioner for Mississippi has this thirtieth day of April fixed and does hereby promulgate the following maximum prices and maximum margins of profit which a retail merchant handling the following named articles of merchandise may charge, and these prices and margins of profit are based on actual, original cost, plus freight or express and war tax, and they are maximum; merchants may sell for less.

Men's and boys suits, costing up to $25, margin of profit 33 1-3 per cent; costing from $25 to $50, inclusive, margin of profit 35 per cent. The commissioner fixes no margains on suits costing merchants above $50.

Ladies' and misses' suits and dresses, same margin of profit as on men's and boys' suits.

Men's, ladies' and children's shoes, costing up to $3, margain of profit 25 per cent; costing from $3 to8, margin of profit 30 per cent; costing from $8 to $10, inclusive, 33 1-3 per cent. The commissioner fixes no margin on shoes costing merchant above $10.

Men's and children's hats: Costing up to $5, margin of profit 30 per cent; costing from $5 to $10, inclusive, 40 per cent; all straw hats, margin of profit 40 per cent. No margin fixed on hats costing merchant above $10.

Ladies' and misses' hats: Costing up to $5, margin of profit 30 per cent; costing from $5 to $10, margin of profit 40 per cent. No margins fixed on ladies' hats costing merchant above $15.

Dry Goods: The margin of profit on all staple dry goods is 33 1-3 per cent; the margin of profit on all fancy dry goods is 40 per cent."

(9) That the said State Fair Price Commissioner and the Fair Price Commissioner for the City of Jackson

had caused the complainants to be inforomed that unless they complied with the basis of profit included in the proclamation hereinbefore set out, that they, and each of them, as well as their agents, servants and employees, would be arrested and prosecuted, and that they, and each of them, must conform their basis of profits as fixed in the said proclamation;

(10) That the said Fair Price Commissioners were subjecting the complainants' places of business to a system of espionage for the purpose of ascertaining whether or not the complainants were receiving any higher basis of profit upon any article of merchandise sold by them, or either of them, than allowed in the said proclamation;

(11) That complainants are not manufacturers of wearing apparel, but that they purchase wearing apparel for re-sale to their trade; that in fixing the prices of their merchandise it was independently of all other dealers; that there is no combination of any kind in restraint of trade between complainants and their competitors; but that the fullest and freest competition exists;

(12) That the complainants are not hoarders of merchandise, but that every article of goods which they possess are daily offered for sale at the customary price; that they do not engage in any interstate business, but that all of their business is local, confined to the City of Jackson and contiguous territory, and that the business engaged in is of a purely private nature, and in no manner coupled with the business of public interest.

(13) That the act of Congress in question is void and uniforcible, because having no relation to any war time necessities on the part of the United States Government, in respect to which the original bill of complaint contains the following allegation:

> "Complainants show unto the Court that said Act of October 22, 1919, being an Act amendatory to the original Lever Act, purported to be enacted as a war time measure. Complainants show unto the Court, however, that the war between the United States and its allies and Germany terminated in November, 1918,

that th the military and naval forces of the United States and its its allies began to demobilize soon thereafter, and upon On October 22, 1919, the military forces of the United States es were practically demobilized, and the United States es Government upon October 22, 1919, had ceased all war ar activities, and it had discahrged the Committee chargeged with the duty of fixing the price of coal, had turned ed back to the owners thereof the telegraph and telepho hone companies, and was ready to turn back to the owowners thereof the railroads, which it has done since, a, as a matter of fact; if war existed at all between the UnJnited States and Germany on October 22, 1919, it existsted only in theory and not in fact.

AnAnd complainants further show unto the Court that ththe passage of said Act of October 22, 1919, had no refeference or relation, either near or remote, direct or indirlirect, to any state of war which may have existed, e either in fact or theoretically, at the time of its passagege, and Congress was without power and authority y under the laws and Constitution of the United States s after the termination of such war to pass any such acact, and certainly without power and authority to passs an act dealing with wearing apparel, which, upon OOctober 22, 1919, could have absolutely no relation or r bearing upon such state of war as may have existed.d. In other words, these complainants allege and avever that upon October 22, 1919, and at all times since ssaid date, so far as the carrying on of war between t the United States and Germany is concerned, if any s such war existed, either theoretically or as a matter c of fact, the price which the complainants might charge e for a gingham dress, or a pair of high heel shoes, a a gentleman's collar, a crepe de chine lady's dress, oor a lady's hat, was without the slightest importancce or signifcance, and had no reference or relation theereto whatsoever, and that an act cannot be a war actt merely by calling the same so; but, upon the other haand, in order to justify such legislation the con-

dition in respect to the subject-matter of legislation must exist and be urgent."

(14) That the prices fixed by the said Fair Price Commissioners are unreasonably low—so low as to be confiscatory; that neither the said Locke or the said Taylor have had experience in the operation of department stores, and are utterly without knowledge or information in respect to the operation thereof, or the basis of profit that should be allowed, and in respect to the basis of profit being confiscatory used the following language:

"Complainants show unto the Court that said proclamation would require the complainants to sell men's and boys' suits costing twenty-five dollars upon a margin of only 33 1-2 per cent; and would require complainants to sell suits costing not over fifty dollars at a profit of not exceeding 35 per cent; would require them to sell shoes costing ten dollars at a profit of not over 33 1-3 per cent; would compel the complainants to sell ladies' and misses' hats costing as much as fifteen dollars for a profit of not over 40 per cent.

Complainants show that in the ordinary conduct of their business that they could not sell all of such articles of wearing apparel upon such basis of profit and realize any profit therefrom; that upon the other hand, the cost of doing business, that is to say the cost of ascertaining the requirements of their customers, anticipating the same, purchasing and re-selling goods therefor, is so great that if the complainants should sell goods at or upon the basis of profit therein proclaimed they would lose money instead of making money, and would operate their business at a loss.

Complainants show unto the Court that during the year 1919 R. E. Kennington Company sold in round figures a million dollars worth of goods, and in its entire turn-over during the said year it did not average but 5.8 per cent profit, and itemized statement of which is hereto attached, marked Exhibit "A" to this bill of complaint, the same being asked to be considered

as if set out herein in full in words and figures, although it sold said merchandise in some instances at a greater profit than is allowed, determined and fixed by the proclamation of the said Fair Price Commissioners, and if it should have to reduce its prices upon wearing apparel in accordance with such illegal, unlawful and arbitrary fixation of prices it would operate at a loss from such conformity thereto, and other complainants do business on the same basis."

(15) The bill of complaint contained the following allegation in respect to the unconstitutionality of the amendments to the Lever Act hereinbfore set out:

"Complainants show unto the Court, however, that said Act of October 22, 1919, charges now no crime against the complainants, or either of them, for the following reasons, to-wit:

(a) Congress was attempting in the passage of said Act to exercise a power not delegated to it by the Constitution of the United States.

(b) Because no state of war existed, as a matter of fact, between the United States and Germany and her allies at the time of the passage of such act.

(c) That wearing apparel bore no relation to such state of war as may have existed, if any, upon the 22nd day of October, 1919, or at any time since, so as to confer upon Congress authority to regulate the prices thereof.

(d) The said amending Act of October 22, 1919, and particularly Section 2 thereof, does not define the offense thereby denounced as a crime for which severe punishment and penalty is thereby provided, but leaves the definition thereof to the judgment and conscience of judges and juries in trials after the fact; therefore, said statute is necessarily an ex post facto law, in conflict with Article 1, Section 9, Sub-division 3 of the Constitution of the United States.

(e) By reason of said facts last aforesaid, said amending act is likewise in conflict with and prohibited by Article 6 of the amendment to the Constitution of

United State, in that no one accused of a violation of said act, in so far as it relates to wearing apparel, or the rates chaged or prices made or exacted in handling, dealing in, orwith selling the same, is or can be thereby informed of the nature or cause of the accusation against him,and no one at the time of the Act which forms the basis of the charge can by any possibility determine whether he is or not violating such statute.

(f) Sail amending Act of October 22, 1919, especially Section 2 thereof, amending Section 4 of the original Act is prohibited by law, and is in violation of Artice 8 of the Amendments to the Constitution of the United States prohibiting the imposition of cruel and unusual punishment in that the punishment provided in said Section is provided for each separate sale which might be made by the complainants, and is therefore in violation of such amendment to the Constitution.

(g) Said amending Act of October 22, 1919, and particularly Section 2 thereof, is in conflict with Article 5 of the Amendments to the Constitution of the United States, in that thereby complainants and each of them, and others similarly situated, are deprived of their liberty and of their property without due or any other process of law, and private property taken without just or any compensation, and in that they are subject to fine and imprisonment for an offense, or offenses, which they were not and could not be previously informed, and the commission of which they could not avoid, because they had not been, and could not be, advised as to what act or acts could or did constitute such offense, and in that they and each of them are and necessarily will be deprived of their liberty and property without due or any other process of law, in that they are thereby deprived of the liberty and private property right of making and carrying out such contracts as they may desire concerning the handling, buyimg and selling of wearing apparel."

(16) The bill of complaint alleged that the defendants thereto announced their purpose of causing the complainants, and each of them, to be arrested, indicted and tried on account of their failure and refusal to conform their basis of profit and the method of operating their business to the proclamation of said Fair Price Commissioners of the State of Mississippi and of the City of Jackson, and that they would be arrested, indicted and tried by reason thereof, unless enjoined by the Court.

The bill further alleged that such criminal prosecutions would subject the complainants, and each of them, to irreparable damage, in that they would be burdened with innumerable prosecutions, which prosecutions would be unjust and wrongful, because based upon unconstitutional enactments of Congress, and because of the abuse to which such enactments were sought to be used by the defendants, and the complainants would further sustain irreparable damage and loss because of the damage to them, and each of them, in their business, loss of credit, injury to financial standing, and good-will growing out of such criminal prosecutions, if they were permitted to take place.

(17) The bill of complaint further alleged that the defendants had selected the complainants as the largest merchants in the State of Mississippi, and were intending to coerce them to conform to the basis of profits fixed by the Fair Price Commissioners, and through them were intending to coerce the merchants of the State of Mississippi; that they were confessedly endeavoring, as they expressed it, to make examples of the complainants because they failed and refused to submit to the wrongful, unlawful and imperious demands made upon them by the defendants, and that unless restrained by the Court the complainants would be caused to suffer irreparable injury therefrom.

The complainants upon filing the original bill of complaint in open court made application for a temporary restraining order, to which the United States District Attorney and his assistants then and there objected; a full and complete hearing was had upon the application, and the Court, being of the opinion that the complainants had

a plain, adequate and complete remedy at law, dismissed the original bill of complaint. (Transcript p. 31). A petition for appeal to this Court was filed and the same allowed by the Judge. (Transcript pp. 32, 33-36). The appeal was allowed under Section 238 of the Judicial Code of the United States.

ARGUMENT:

I.

THE LEVER ACT OF AUGUST 10, 1917, AS WELL AS AMENDMENTS OF OCTOBER 22, 1919, VIOLATED THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT PRIVATE PROPERTY IS TAKEN WITHOUT DUE COMPENSATION.

Irrespective of the question as to whether or not a state of war existed on October 22, 1919, the Act complained of, as well as the amendments thereto, are unconstiuttional and a violation of the Fifth Amendment to the Constitution of the United States, because private property was thereby taken without due compensation.

It will, of course, be conceded that the right of the plaintiffs in error to buy goods and sell them in due course of business at such price as could be obtained, in the absence of any combination or agreement in restraint of trade, is property, protected against state legislation by the Fourteenth Amendment to the Constitution of the United States, and against illegal congressional legislation by the Fifth Amendment to the Constitution of the United States. Lochner v. State of New York, 198 U. S. 45, 49 L. Ed 937.

It is well established that, even in time of war, the Government cannot take private property without first making compensation therefor. Mitchell v. Harmony, 13 Hunt, 115; United States v. Russell, 13 Wall, 623, 627, 629; Milligan Case, 4 Wall, 121.

II.

UPON OCTOBER 22, 1919, AT THE DATE OF THE PASSAGE OF THE AMENDMENTS TO THE LEVER ACT CMPLAINED OF, AND AT THE TIME OF THE

FILING OF THE ORIGINAL BILL IN THIS CASE, EVEN IF WAR BETWEEN THE UNITED STATES AND GERMANY TECHNICALLY EXISTED, THE PURCHASE AND SALE OF WEARING APPAREL BORE NO SUCH RELATION THERETO AS JUSTIFIED GOVERNMENTAL INTERFERENCE WITH THE PRICE THEREOF.

Ordinarily, the Government cannot concern itself with the price obtained for merchandise. So long as a merchant conducts his business independently and not in unlawful combination with other persons he is entitled to obtain any price which he may in the open market for his merchandise, and may refuse to sell for any less price without subjecting himself to punishment therefor.

In Tiedeman's State and Federal Control of Persons and Property, Volume 1, Paragraph 96, the following language is used:

> "It is part of the natural and civil liberty to form business relations, free from the dictation of the state, that a like freedom should be secured and enjoyed in determining the conditions and terms of the contract which constitutes the basis of the business relation or transaction. It is, therefore, the general rule, that a man is free to ask for his wares or his services whatever price he is able to get and others are willing to pay; and no one can compel him to take less, although the price may be so exorbitant as to become extortionate. No one has a natural right to the enjoyment of another's property upon the payment of a reasonable compensation; for we have already recognized the right of one man to refuse to have dealings with another on any terms, whatever may be the motive for his refusal."

In the case of Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, Mr. Justice Field, speaking for the Court, used the following language:

> "The public is interested in the manufacture of cotton, woolen and silken fabrics, in the construction of machinery, in the printing and publication of books

> and periodicals, and in the making of utensils of every variety, useful and ornamental; indeed, there is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community, in which the public has not an interest in the sense in which that term is used by the court in its opinion; and the doctrine which allows the Legislature to interefere with and regulate the charges which the owners of property thus employed shall make for its use, that is, the rates at which all these different kinds of business shall be carried on, has never before been asserted, so far as I am aware, by any judicial tribunal in the United States."

Therefore, it will doubtless be conceded that if legislation of the character complained of in this case can be justified at all, it can only be justified on the ground that a state of war existed between the United States and Germany, and that the United States Government, in the exercise of its police power for the protection of its citizenship, was not restrained by the Fifth Amendment to the Constitution of the United States.

In the case of Elwood Hamilton, Collector of Internal Revenue v. Kentucky Distilleries & Warehouse Co., U. S. Adv. Ops., 1919-1920, page 113, this Court used the following language:

> "That the United States lacks the police power, and that this was reserved to the states by the 10th Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by the State of its police power, or that it may tend to accomplish a similar purpose. Lottery case (Champion v. Ames) 188 U. S. 321, 357, 47 L. Ed. 492, 501, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; McCray v. United States, 195 U. S. 27, 49 L. Ed. 78, 24 Sup. Ct. Rep, 769, 1 Ann. Cas. 561; Hipolie Egg Co. v. United States, 220 U. S. 45, 58, 55 L. Ed. 364, 368,

31 Sup. Ct. Rep. 364; Hoke v. United States, 227 U. S. 308, 323, 57 L. Ed. 523, 527, 43 L. R. A. (N. S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; Seven Cases v. United States, 239 U. S. 510, 515, 60 L. Ed. 411, 415, L. R. A. 1916D, 164, 36 Sup. Ct. Rep. 190; United States v. Doremus, 249 U. S. 86, 93, 94, 63 L. Ed. 493, 496, 497, 39 Sup. Ct. Rep. 214. The war power of the United States, like its other powers and like the police power of the states, is subject to applicable constitutional limitations (Ex Parte Milligan, 4 Wall, 2, 121-127, 18 L. Ed. 281, 295-298; Monongahela Nav. Co. v. United States, 148 U. S. 312, 336, 37 L. Ed. 463, 471, 13 Sup. Ct. Rep. 622; United States vs. Joint Traffic Asso. 171 U. S. 505, 57I, 43 L. Ed. 259, 288, 10 Sup. Ct. Rep. 25; McCray v. United States, 195 U. S. 27, 61, 49, L. Ed. 78, 97, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; United States vs. Cress, 243 U. S. 316, 326, 61 L. Ed. 746, 752, 37 Sup. Ct. Rep. 380); but the 5th Amendment imposes in this respect no greater limitation upon the national power than does the 14th Amendment upon state power (Re Kemmler, 136 U. S. 436, 448, 34 L. Ed. 519, 534, 10 Sup. Ct. Rep. 930; Carroll v. Greenwich Ins. Co. 199 U. S. 401, 410, 50 L. Ed. 246, 250, 26 Sup. Ct. Rep. 66). If the nature and conditions of a restriction upon the use or disposition of property are such that a state could, under the police power, impose it consistently with the 14th Amendment without making compensation, then the United States may for a permitted purpose impose a like resrtiction consistently with the 5th Amendment without making conpensation; for prohibition of the liquor traffic is conceded to be an appropriate means of increasing our war efficiency."

Notwithstanding this language, however, the Court made it perfectly clear that before the United States Government could exercise its police power and transgress the 5th Amendment to the Constitution of the United States, the emergency which gave rise to such legislation must actually exist. The Court said:

"Assuming that the implied power to enact such a prohibition must depend not upon the existence of a technical state of war, terminable only with the ratification of a treaty of peace or a proclamation of peace, but upon some actual emergency or necessity arising out of the war or incident to it."

Our contention is that the purchase and sale of wearing apparel, and the profits derived therefrom, by a retail merchant upon October 22, 1919, and at the time of the filing of the original bill in this case, bore absolutely no relation whatsoever to any state of war which may or may not have existed between the United States and Germany; that before the United States Government could exercise its police power the emergency must actually exist and should be urgent, and that the power should not be exercise beyond what the exigency actually required.

The exact question was presented in the case of Raymond v. Thomas, 91 U. S. 712, 23 L. Ed. 434. In that case, at the conclusion of the Civil War, but while South Carolina was still occupied by the military authorities of the United States for the purpose of reconstruction, a military commander, acting under the United States statutes, issued a decree forbidding the institution of civil suits for the enforcement of private claims. One of the state courts of South Carolina, in violation of the order, entered a decree, and the military commander, acting under what he assumed to be his authority therefor, entered an order purporting to set the decree aside. This Court, however, held that the order in question which was complained of bore no such relation to the emergency which existed as justified the same; and further held that such emergency acts should never be pushed beyond what the exigencies of war demanded. The Court used the following language:

"We have looked carefully through the Acts of March 2nd, 1867, and July 19, 1867. They give very large governmental powers to the military commanders designated, within the states committed respectively to their jurisdiction, but we have found nothing to warrant the order here in question. It was not an

order for mere delay. It did not prescribe that the proceeding should stop until credit and confidence were restored, and business should resume its wonted channels. It wholly annulled a decree in equity, regularly made by a competent judicial officer in a plain case clearly within his jurisdiction, and where there was no pretense of any unfairness, of any purpose to wrong or oppress, or of any indiscretion whatsoever.

The meaning of the legislature constitutes the law. A thing may be within the letter of a statute, but not within its meaning; and within its meaning, though not within its letter. (Stewart v. Kahn, supra).

The clearest language would be necessary to satisfy us that congress intended that the power given by these Acts should be so exercised.

It was an arbitrary stretch of authority, needful to no good end that can be imagined. Whether Congress could have conferred the power to do such an act is a question we are not called upon to consider. It is an unbending rule of law, that the exercise of military power, where the rights of the citizens are concerned, shall never be pushed beyond what the exigency requires. Mitchell v. Harmony, 13 How. 115; Warden v. Bailey, 4 Taunt. 67; Mostyn v. Fabrigas, 1 Cowp. 161; S. C. 1 Smith, L. C. Pt. 2, 934. Viewing the subject before us from the standpoint indicated, we hold that the order was void."

So, we claim in this case that upon October 22, 1919, no emergency existed which justified the Act of Congress as a war measure and in the exercise of its police power to pass any act having to do with the profits made in the purchase and sale of wearing apparel.

The bill shows, and the Court takes judicial notice, that actual war between the United States, its allies, and Germany, terminated in November, 1918; that the military and naval forces of the United States and its allies at once began to demobilize, and, upon October 22, 1919, the military forces of the United States Government were practically demobilized. Upon the 22nd day of October, 1919,

and the date that the original bill in this case was filed, the United States Government had ceased all war time activities; it had discharged the Committee charged with the duty of fixing the price of coal; it had relieved the censorship over telegraph and telephone companies, and turned these utilities back to their owners; at the time of the filing of the original bill in this case the railroads had been turned back to their owners, and about that time the organization for the regulation of the price of grains had been dissolved. The United States Government, as a war measure, was no longer interested in the basis of profit had by merchants in the sale of wearing apparel.

It is a well-known fact, of which the Court will take judicial knowledge, that the Government for the use of its soldiers was purchasing no wearing apparel at that time. Upon the other hand, upon the date that the armistice was signed the United States Government had on hand enormous supplies of wearing apparel, and upon October 22, 1919, and at the date of the filing of the original bill in this cause, it was, and had been for months, a large vendor of these same commodities. Therefore, we respectfully submit that the Congressional enactments complained of cannot be justified as war measures or as a legitimate exercise of its police power on the part of the United States Government.

In the exercise of its war power, that is to say, in the demobilization of its army, and in carrying on such war time activities as were necessary in the protection of its citizenship, arising out of war, the United States Government was not interested in the profits which a merchant might make on a lady's crepe de chine dress, men's and boys' suits of clothes, ladies' and misses' suits and dresses, and men's and boys' or ladies' and misses' hats. Yet, according to the allegations of this bill and the admissions arising therefrom, we find the United States Government in May, 1920, at the time the original bill was filed, taking active steps to indict and bring to trial these complainants for refusing to conform their basis of profit to the margin

of profit arbitrarily fixed, or claimed to have been fixed, under the Lever Act and the amendments thereto.

Our position is simply this: That even if it be conceded that the United States Government, in the exercise of its police power and as a war measure, could pass regulation affecting and regulating the price of commodities having reference to a state of war, that such legislation must necessarily be limited to the exigencies thereby required, and that Congress could not, under the guise of a war measure, regulate the prices of commodities bearing absolutely no relation whatever to a state of war. In other words, that the measure did not become a legitimate war measure merely because Congress so designated the Act.

Upon the other hand, this Court has the right, and it is its duty, to examine the Act and see as to whether or not it bear such relation to a state of war as justifies its passage and enforcement. The question presented is a judicial question and not a legislative question, as will appear from the citations hereinafter made.

The case of Elwood Hamilton v. Kentucky Distilleries & Warehouse Company, supra, decided by this Court December 15, 1919, does not militate in any manner against our contention. At the time of the passage of that Act and at the time of the institution of the original bill in that case, the United States Government had a large standing army and navy; the sale and distribution of intoxicating liquors, as is and was known to all men, injuriously affected the morale, as well as the morality of the army; it was of vital importance to the Government that the physical and moral condition of our soldiers and sailors in time of war be protected by appropriate legislation. We might go further than that and say that it would appear to us that so long as the United States government, even in time of peace, has an army and navy, for the protection, morality and well-being thereof, it would have the right to regulate, or even prohibit, the manufacture and sale of intoxicating liquors. But certainly, in a time of war, in this age, the authority could hardly be questioned.

In other words, the manufacture and sale of intoxicating liquors bore a direct relation to such state of war as actually existed. When we turn, however, this standard which has been fixed by the Court to the acts complained of in this original bill of complaint, we find that they bear no such relation to any war time activities as justifies the Acts complained of as legitimate police measures on the part of Congress.

In other words, we respectfully submit that the basis of profit charged for men's collars, ladies' crepe de chine dresses, boys' and men's suits, and ladies' and misses' dresses, in May, 1920, bore no relation whatsoever to any state of war, and were clearly beyond the exigencies which justified any such legislation.

We desire, in this connection, to direct the attention of the Court to the very recent case of Holter v. Boyle, 263 Fed. 14. In that case it appears that the Legislature of the State of Montana passed an act regulating and affecting the prices at which all merchandise should be sold. The enforcement of the Act was enjoined in the District Court of the Unted States in the State of Montana, and the Court held that the Act could not be justified as a war measure, because it embraced so many commodities having no relation to any state of war. The Court used the following language:

> "This construction of Constitutions is virtually a rule of property and a principle of government, not to be changed by legislatures or courts in any circumstances, but only by the people by constitutional amendment. The other Legislatures and Congress, during the war enacted like laws, demonstrates that Montana's Legislature does not stand alone, but no more. It may be observed Congress proceeds under the war power, which is also subject to constitutional limitations, subject to the "due process" clause of the Fifth Amendment. Hamilton v. Warehouse Co., supra.
>
> It may be further observed that, however it might be if the enactment was limited to the prime necessities and was a war measure, it is inconceivable that

its all-embracing provisions, now when the war is over, save as a fiction perpetuating rather dictatorial powers, are necessary to public health, peace, and safety. It ranges from the street corner vendor of popcorn and banana to the merchant prince, from coal to diamonds, from the babe's first swaddling band and cradle to the aged man's shroud, his coffin, and his grave. Trifles, necessities, luxuries—all are within its scope. As a whole the enactment would accomplish a complete reversal of the American system of business economics that has prevailed from the Nation's birth. True, there is no federal control over any state in the matter of economic theories it will pursue, provided not counter to constitutional limitations. But that involved here goes beyond economics, and virtually invades and changes the methods, if not the system, of government. Who will question the wisdom of the Constitution that this shall not be done, save by three-fourths of the states in concert?"

This Court has repeatedly held that as to whether or not the enactment of state legislation is a legitimate exercise of its police power, or merely pretends to be such and violates the Fourteenth Amendment to the Constitution of the United States, or that the question as to whether or not an Act of Congress is a legitimate exercise of the constitutional authority conferred upon it, presents a judicial question and this Court has exercised its right to examine the act itself, with all the circumstances of its passage, and to determine for itself as to whether or not the act complained of was a valid exercise of the power purported to be availed of.

We would call the attention of the Court to the rule, which, of course, will not be denied, that the Fourteenth Amendment to the Constitution of the United States restricts state legislation and the Fifth Amendment to the Constitution of the United States restricts Congressional legislation, and cases cited in respect to one amendment are applicable to the other. Such was expressly held by

this Court in the case of Elwood Hamilton v. Kentucky Distilleries & Warehouse Company, supra.

The identical question was present in the case of Lochner v. State of New York, supra. In that case the constitutionality of a labor law of New York forbidding adults from working in bakeries for more than a certain number of hours daily was sought to be justified on the ground that it was the exercise of the police power of the State. This Court used the following language in holding that the Act violated the Fourteenth Amendment to the Constitution of the United States, and had no reference to any legitimate exercise of the police power of the State of New York.

> "The State, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one in which the state, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment. Contracts in violation of a statute, either of the Federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution, as coming under the liberty of persons or of free contract. Therefore, when the state by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right of labor or the right of contract in regard to their means of livelihood between persons who are **sui juris** (both employer and employee), it becomes of great importance to determine which shall prevail,—the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring or from entering into any contract to labor, beyond a certain time prescribed by the state.
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> It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the

purpose of protecting the public health or welfare, are in reality, passed from other motives. We are justified in saying so, when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed, and whether it is or is not repugnant to the Constitution of the United States, must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. Minnesota v. Barber, 136 U. S. 313, 34 L. Ed. 455; Brimmer v. Rebman, 138 U. S. 78, 34 L. Ed. 862. The court looks beyond the mere letter of the law in such cases. Yick Wo. vs. Hopkins, 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064."

The case of William Adair v. United States, 208 U. S. 161, 52 L. Ed. 436, is directly in point. In that case there was presented for review an act of Congress forbidding an interstate railroad company from discharging an employee because he was a member of a labor union. This congressional enactment was sought to be justified on the ground that Congress had the right to regulate interstate commerce. The Court held that the Act violated the Fifth Amendment to the Constitution of the United States; that while the Act purported to regulate interstate commerce, as a matter of fact it had no relation thereto; that under the guise of regulating interstate commerce the right of contract was interfered with. The Court used the following language:

"Looking alone at the words of the statute, for the purpose of ascertaining its scope and effect, and determining its validity, we hold that there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership on his part. If such a power exists in Congress, it is difficult to perceive

why it might n not by absolute regulation, require interstate carriersrs under penalties to employ, in the conduct of its intererstate business, only members of labor organizations, o or only those who are not member of such organizatiitions which could not be recognized as existing uncnder the Constitution of the United States. No suchch rule of criminal liability as that to which we have e referred can be regarded as, in any just sense, a reregulation of interstate commerce. We need scarcely re repeat what this court has more than once said, that it the power to regulate interstate commerce, great anand paramount as that power is, cannot be exerted in vi violation of any fundamental right secured by other pr provisions of the Constitution. Gibbons v. Ogden, 9 Wheaeatly. 196, 6 L. Ed. 23, 70; Lottery Case, 188 U. S. 321, 4747 L. Ed. 492, 23 Sup. Ct. Rep 321."

The case of W. C. C. Hammer, United States Attorney, v. Dagenhart, 247 U. S. S. 251, 62 L. Ed. 1101, presented a very interesting question. n. Under the guise of regulating interstate commerce, Conongress passed an Act prohibiting the employment of minoriors in factories for more than a certain number of hours dailaily, and providing that no goods manufactured should be sh shipped in interstate commerce where the Act was violated.ed. The Act was passed and sought to be maintained as one ne regulating interstate commerce. This Court held, however, er, that the Act had no such relation to interstate commerce ee as justified its passage, using the following language:

"In interprepreting the Constitution, it must never be forgotten thathat the nation is made up of states, to which are intrusrusted the powers of local government. And to them and nd to the people, the powers not expressly delegated to the he national government are reserved. Lane County v. Or. Oregon, 7 Wall. 71, 19 L. Ed. 101. The power of the stastates to regulate their purely internal affairs by such lh laws as seem wise to the local authority is inherent, at, and has never been surrendered to the general governmnment. New York v. Miln, 11 Peters, 102, 139, 9 L. Ed Ed. 648, 662; Slaughter-House Cases, 16

Wall. 36, 63, 21 L. Ed. 394, 404; Kidd v. Pearson, supra. To sustain this statute would not be, in our judgment, a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the Federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states.

We have either authority or disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations, and not by an invasion of the powers of the states. This Court has no more important function than that which develoves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties intrusted to it by the Constitution.

In our view, the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states—a purely state authority. Thus, the act in a two-fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the Federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters intrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed.

For these reasons, we hold that this law exceeds

the constitutional authority of Congress. It follows that the decree of the District Court must be affirmed."

Even if it be true that in time of war, and as a war measure, Congress could pass an act regulating the prices of commodities, such act should necessarily be limited to commodities bearing some material relation to the power sought to be exercised. Under the guise of exercising such a right, a law regulating the purchase and sale of commodities bearing no relation thereto, should not be enacted and cannot be justified. The right and the exercise thereof are measured by the necessity therefor; the right and the exercise thereof are limited by the actual necessity, and the exercise of the right should not be pushed beyond the exigencies of the occasion.

The basis of profit had by retail merchants for the sale of wearing apparel on October 22, 1919, bore no relation to any state of war which existed, and Congress could not make such legislation bear any such relation by merely labeling it as "war time legislation." The Court judicially knows that no such exigency as justified the legislation complained of existed. It must be borne in mind that the plaintiffs in error in this case dealt only in wearing apparel. In other words, no other article regulated by the Lever Act was purchased or sold by them, and for that reason we confine our argument to the legality of the Act as represented by wearing apparel alone.

III.

SECTION 4 OF THE ACT OF OCTOBER 22, 1919, VIOLATES THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT CITIZEN IS NOT INFORMED AS TO THE NATURE OF THE OFFENSE; THE ACT IS TOO VAGUE AND UNCERTAIN TO FORM THE BASIS OF A CRIMINAL PROSECUTION.

So far as this discussion is concerned, Section 2 of the Act of October 22, 1919, prohibited the following: "To make any unjust or unreasonable rate of charge in hand-

ling or dealing in or with any necessaries." The Act contains no provision as to what basis of profit shall be received. It provides no standard as to what shall be considered an unjust or unreasonable charge. It is perfectly apparent from the Act that the question as to what facts constituted the crime, as well as to the question as to whether or not the facts had been committed by a defendant would necessarily be left solely to the discretion of the jury. In other words, under the Act, the jury would have to decide, not only as to whether or not the defendant was guilty of committing the things which were criminal, but would also have to decide what things were criminal. Not only that, but the same act would be innocent in one community in the same state, and a crime in another. But that is not all. A merchant in a town may have purchased an article for ten dollars and sold it for twenty, and the jury might decide that under the statute a crime had been committed; another merchant in the same town may have purchased the same identical commodity for eighteen dollars and sold it for twenty-five dollars, and the jury might infer that no crime had been committed. The trouble about the section is that it is vague and indefinite, and furnishes no proper standard for determining the guilt or innocence of any defendant, but leaves both the law and the facts to the jury for their own determination.

The question was presented for the first time in this Court in the case of United States v. Reese, 92 U. S. 214, 23 L. Ed 563. An act of Congress prohibited election officers preventing any person from voting on account of his race. The Act provided that any person desiring to vote could make an affidavit that he had been wrongfully denied the right to qualify, and it should be taken as if he had complied with all the law; thereupon, a failure to allow him to vote was made a crime. The Court held that the act was too vague and uncertain, using the following language:

> The elector under the provisions of the statute, is only required to state in his affidavit that he has been wrongfully prevented by the officer from qualifying. There are no words of limitation in this part of

the section. In a case like this, if an affidavit is in the language of the statute, it ought to be sufficient both for the voter and the inspector. Laws which prohibit the doing of things, and provide a punishment for their violation, should have no double meaning. A citizen should not be unnecessarily placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution for a false oath; and an inspector of elections should not be put in jeopardy because he, with equal honesty, entertains an opposite opinion. If this statute limits the wrongful act which will justify the affidavit to discrimination on account of race, etc., then a citizen who makes an affidavit that he has been wrongfully prevented by the officer, which is true in the ordinary sense of that term, subjects himself to indictment and trial, if not to conviction, because it is not true that he has been prevented by such a wrongul act as the statute contemplated; and if there is no such limitation, but any wrongful act of exclusion will justify the affidavit, and give the right to vote without the actual performance of the prerequisite, then the inspector who rejects the vote because he reads the law in its limited sense, and thinks it is confined to a wrongful discrimination, on account of race, etc., subjects himself to prosecution, if not punishment, because he has misconstrued the law. Penal statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define by statute a new offense and provide for its punisment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

The question was next presented in this Court in the case of International Harvester Company v. Kentucky, 234 U. S. 216, 58 L. Ed. 1284. A statute of the State of Kentucky made it a crime to combine and fix the price of any commodity above its market value. The Court held that

the act was too uncertain for enforcement, using the following language:

> "This perhaps more plainly concerns the justice of the law in its bearing upon the plaintiff in error, when compared with its operation upon tobacco raisers who are said to have doubled or trebled their prices, than on the constitutional question proposed. But it also concerns that, for it shows how impossible it is to think away the principal facts of the case as it exists, and say what would have been the price in an imaginary world. Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator. It is a fact, and generally is more or less easy to ascertain. But what it would be with such increase of a never extinguished competition as it might be guessed would have existed had the combination not been made, with exclusion of the actual effect of other abnormal influences, and, it would seem, with exclusion also of any increased efficiency in the machines, but with inclusion of the effect of the combination so far as it was economically beneficial to itself and the community, is a problem that no human ingenuity could solve. The reason is not the general uncertainties of a jury trial, but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. The very community, the intensity of whose wish relatively to its other competing desires determines the price that it would give, has to be supposed differently organized and subject to other influences than those under which it acts. It is easy to put simple cases; but the one before us is at least as complex as we have supposed, and the law must be adjudged by it. It is our opinion it cannot stand."

The question was next presented in this Court in the case of Collins v. Kentucky, 234 U. S. 634, 58 L. Ed. 1510. The Court held as being too vague and uncertain a Kentucky statute making it a crime to sell pooled tobacco with-

out the consent of the agent of the pool, citing International Harvester Company v. Kentucky, supra.

A very similar question was presented in the case of Louisville & Nashville Railroad Company v. Railroad Commission of Tennesee, 19 Fed. 679. That case was heard before three District Judges, and was on application for injunction preventing the enforcement of an act of the legislature of Tennessee to define the duties of the Railroad Commission, and was for the purpose of preventing the Railroad Commission of the State of Tennessee enforcing the provisions of the Act. Among other things, the Act made it a crime for a railroad company to require more than a just and reasonable compensation, and required them to avoid unjust and unreasonable discrimination, and punished criminally a violation of the statute. It was held that the statute was too uncertain for enforcement, and the Court used the following language:

> "The complainant insists that the act is too indefinite to sustain a suit for the penalties therein imposed, the offense for which said penalties are to be inflicted not being sufficiently defined. The definition of the two principal of these offenses, is,—**First**, the taking of 'unjust and unreasonable compensation;' and, **secondly**, the making of 'unjust and unreasonable discriminations.' But what is unjust and unreasonable compensation, and unjust and unreasonable discrimination? And can an action, **quasi** criminal, be predicated thereon? It was expressly held to the contrary in the case of Cowan v. East Tenn., V. & G. R. Co., decided a few years since, at Knoxville, (but not reported), because, as the learned judge said, 'it would have to be left to a jury, upon the proof, to say whether the difference' an rates 'was discrimination or not,' and that the same difference 'might in one instance be held a violation of the law and in another not,' thus making the guilt or innocence of the accused dependent the finding of the jury, and not upon a construction of the act. 'This,' he said, 'I think cannot be done.' If this decision is authoritative, it is conclusive of this part

of this case. We think the decision clearly right. Questions as to what is a reasonable time for the performance of a contract, or reasonable compensation for work and labor done by one man at the request of another without any stipulation as to the price to be paid, and other like cases, frequently arise in civil controversies. But the law furnishes, in all such cases, a standard of compensation for the guidance of the jury. Without such legal standard there could be no reasonable approximation to uniform results; the verdicts of juries would be as variant as their prejudices, and this could not be tolerated. To thus relegate the administration of the law to the unrestrained discretion of the jury; to thus authorize them to determine the measure of damages and then assess the amount to which a plaintiff may be entitled, would inevitably lead to inequalities and to injustice. Hence, the statute under consideration undertakes to supply this desideratum by which juries are to be governed in the determination of the questions submitted to them. That standard is 'that no rates or charges for service in the transportation of freight over any railroad, shall be held or considered extortionate or excessive under any proceeding under this act, if it appears from the evidence that the net earnings * * * from its passenger and other traffic would not amount to more than a fair and just return on the value of which such railroad roads with its appurtenances and equipments to be assessed for taxation.'"

The case last above cited was approved by this Court in the case of John M. Stone v. Farmers' Loan and Trust Company, 116 U. S. 307, 29 L. Ed. 636. In differentiating the Tennessee statute from the Mississippi statute, the Court used the following language:

"It is difficult to understand precisely on what ground we are expected to decide that this statute is so inconsistent and uncertain as to render it absolutely void on its face. The statute of Tennessee which was under consideration in Louisville & Nashville Railroad

Co. v. Railroad Commission of Tennesee, 19 Fed. Rep. 679, is materially different from this in many respects. That case was decided before this statute was passed, and it is not at all unlikely that the Legislature of Mississippi made use of the decision in framing their bill so as to avoid some, if not all, of the objections which, in the opinion of the court, were fatal to what had been done in Tennesee. The argument on this branch of the controversy contains much that might have been useful if addressed to the Legislature while considering the bill before its final enactment; but we find nothing in it to show that the statute as it now stands is altogether void and inoperative. When the Commission has acted and proceedings are had to enforce what it has done, questions may arise as to the validity of some of the various provisions which will be worthy of consideration, but we are unable to say that, as a whole, the statute is invalid."

A statute almost identical with the statute in question was involved in the case of Louisville & Nashville Railroad Company v. Kentucky, 99 Ky. 132, 35 S. W. 129, 33 L. Ed. 209, 59 Am. St. Rep. 457. In that case the Kentucky statute made it a crime for any railroad company to collect or receive more than a just and reasonable rate for the transportation of passengers or freight. The Company was indicted under the statute, and the Supreme Court of Kentucky held that the statute was incapable of enforcement, using the following language:

"The chief question to be considered is the one affecting the validity of the statute, the provisions of which are found in Sections 816 and 819 of the Kentucky Statutes. The first-named section reads as follows: 'If any railroad corporation shall charge, collect, or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this state, or the use of any railroad car upon its track or upon any track it has control of, or has the right to use in this state, it shall be guilty of extortion.' Section 819 fixes the penalty for

the first offense at not less than $500 nor more than $1,000, and increases the penalty for subsequent infractions of the law. The circuit court of any county into and through which the road runs and the Franklin circuit court are given jurisdiction of the offense, the prosecution to be by indictment, or action in the name of the commonwealth, upon information filed by the board of railroad commissioners. That this statute leaves uncertain what shall be deemed 'just and reasonable rate of toll or compensation' cannot be denied; and that different juries might reach different conclusions on the same testimony, as to whether or not an offense has been committed, must also be conceded. The criminality of the carrier act, therefore, depends on the jury's view of the reasonableness of the rate charged. And this latter depends on many uncertain and complicated elements. That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it cannot be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct. And it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law, which may be known in advance, but on one erected by a jury; and especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime."

This court gave approval to the case last cited in the case of Waters-Pierce Oil Company v. State of Texas, 212 U. S. 86, 53 L. Ed. 417. In that case the Court had under review a Texas statute which punished criminally acts

which were reasonably calculated to have the prohibitive result, and in this Court the case of Louisville & Nashville R. R. Co. vs. Kentucky, supra, was cited in support of the contention of plaintiff in error that the statute was too uncertain for enforcement. This Court, however, used the following language, by which we think it lent its approval to the doctrine announced in the Kentucky case:

> "In support of this contention it is argued that laws of this nature ought to be so explicit that all persons subject to their penalties may know what they can do, and what it is their duty to avoid. And reference is made to decisions which have held that criminal statutes should be so definite as to enable those included in its terms to know in advance whether an act is criminal or not. Among others, Tozer v. United States, 4 inters. Com. Rep. 245, 52 Fed. 917, is cited, in which the opinion was by Mr. Justice Brewer, then judge of the circuit court, in which it was held that the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. To the same effect is Chicago & N. W. R. Co. v. Dey, 1 L. R. A. 744, 2 Inter, Com. Rep. 325, 35 Fed. 866, also decided by Justice Brewer at circuit. And also the case of Louisville & N R. Co. vs. Com. 99 Ky. 132, 33 L. R. A. 209, 59 Am. St. Rep. 457, 35 S. W. 129, is relied upon, in which a railroad was indicted for charging more than a just and reasonable rate, in which it was held that the law was unconstitutional, for, under such an act, it rests with the jury to say whether a rate is reasonable, and makes guilt not upon standards fixed by law, but upon what a jury might think as to the reasonableness of the rate in controversy. But the Texas statutes in question do not give the broad power to a court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable, as to the statutes condemned in the cases cited."

The question was presented in the case of Capital Traction Company, 34 App. Cases, D. C., 592. In that case

the Act of Congress required the street railway companies to accommodate all persons desirous of using cars without crowding the said cars, and punishing failure so to do, was held too indefinite and uncertain for enforcement. The Court used the following language:

> "In a criminal statute the elements constituting the offense must be so clearly stated and defined as to reasonably admit of but one construction. Otherwise there would be lack of uniformity in its enforcement. The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things and providing a punishment for their violation, should not admit of such a double meaning that the citizens may act upon the one conception of its requirements and the courts upon another. As was said in U. S. v. Reese, 92 U. S. 214, 23 U. S. (L. Ed.) 563: 'If the legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committting a crime. It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.'
>
> Penalties cannot be inflicted at the discretion of a jury. Before the citizen can be deprived of his liberty or a corporation of its property by the imposition of fines, the crime must be clearly defined by the law-

making power. If the Congress has power to declare it a crime for street railway companies in the District of Columbia to operate cars in a crowded condition, it must, in order to impart validity to the law, declare, with certainty, what constituted, under the statute, a crowded car. This it has totally failed to do.

It is unnecessary for us to consider in this case the power of the Insterstate Commerce Commission to supply, by rule or regulation, what the statute lacks. No such attempt has been made; hence the question is not before us. The judgment of the police justice sustaining the motion to quash the information is affirmed, and it is so ordered."

In the case of Stoutenburgh v. Frazier, App. Cases (D. C.), 48 L. R. A. 220, it was held that an Act of Congress defining as a crime a suspicious person was too vague and indefinite for enforcement.

In the case of State v. Gaster (La.) 12 So. 739, which presented for construction a statute of the State of Louisiana punishing an officer guilty of any misdemeanor in office, the Court held that the statute was too indefinite, using the following language:

"We are bound to hold that this statute, which punishes misdemeanors in office without defining it, and imposing on the judges, as Mr. Livingston says, 'not only the judicial task of apportioning what shall be the punishment, but also the legislative duty of declaring what acts shall be misdemeanors,' violates the Constitution of the State, and can, therefore, furnish no foundation for this prosecution.'"

So, in this case, there will be devolved upon the jury the duty of determining what acts shall constitute crimes, and also determining whether or not the acts have been committed.

The question is also illustrated in the case of Augustine v. State of Texas, 96 A. S. R., 765. In that case the statute punished the acts of two or more persons having combined to commit murder by mob violence. The Supreme

Court of Texas held that the Act was too uncertain for enforcement, using the following language:

> "As we have seen, the act is not complete within itself, but we are required to appeal to another law, to-wit, the law of murder, in order to explain and give it force; but the law of murder furnishes no light as to what the legislature intended by mob violence, and we appeal to all other laws on our statute books in vain to ascertain what the legislature meant by the term 'mob violence.' To hold that the act was intended to embrace every killing by two or more persons in pursuance of a previously formed design to kill, or to inflict some injury which resulted in killing, would lead to grave results, evidently never intended by the legislature, calculated to produce complication and confusion, and which, while remedying no evil, would destroy rights and create vexations and oppressions. The effect would be not only to haras the citizen by requiring him to be prosecuted in some other county than where the offense was committed, in a great number of cases, evidently never contemplated by the legislature, but would impair the efficiency of the law and the administration of justice in the courts, if we gave such latitude of construction as is here claimed. As presented, we believe that the act in question is so indefinitely framed, and is of such doubtful construction, that it cannot be understood, either from the language in which it is expressed or from any written law of this state. We have given this question much thought and study, and we confess to being unable to solve the difficulty, and to determine what the legislature really meant by the term 'mob violence,' or what character of cases they intended the act should embrace. It is so uncertain in its terms as to escape intelligent construction, and we therefore declare it inoperative and void. Now, if this be a correct interpretation of the law, it settles this case, and it is not necessary for us to discuss whether or not, if the act was operative, it would be retroactive,

and render nugatory all prosecutions against mobs for murder begun before the passage of the act in question. There being no error in the record, the judgment is affirmed."

We refer the Court to the case of Ex Parte Jackson, 45 Ark. 158, in which case a statute making it a misdemeanor to commit any act injurious to health, public morals, etc., was held to be too vague and indefinite to afford a basis for criminal prosecution.

The identical acts involved here were declared unenforceable by the District Court of the United States for the Eastern Division of Michigan in the case of Detroit Creamery Company v. Kinnane, 264 Federal 845, wherein the Court used the following language:

"Such an indictment, however, could not specify the offense thus charged with any more detail, for the reason that the statute purporting to create such an offense does not state the facts, acts, or conduct necessary to constitute the crime denounced. What is an unjust rate or an unreasonable charge? In determining this question, what elements are to be taken into consideration? What is the test, or standard, or basis which is to be used in attempting to ascertain whether this statute has been violated? The statute itself furnishes no assistance in the way of answering this question. Is the reasonableness or justice of a rate to be determined by the amount of profit derived therefrom? If so, what percentage of profit from the business of selling a certain article makes the rate or charge in handling or dealing in that article unreasonable, and therefore unlawful and criminal? If such profit is derived from a business devoted to the sale of several kinds of articles, how is the portion of such profit properly chargeable to each of such articles to be determined, so that the person engaging in such business may know whether or not he is a criminal? What elements enter into the question whether any particular charge is just or unjust, reasonable or unreasonable? What relation to the reasonableness of a rate

have the cost of labor, the cost of machinery and of raw material, the cost of overhead charges, and the other expenses of production? How is the amount properly chargeable to the expenses to be fixed and ascertained? To what extent are differences in market conditions in different places to be considered? Is the existence or absence of competition to be taken into account? Is any allowance to be made for losses and misfortunes which affect costs and profits? To whom must a rate or charge be unjust, to be 'unjust' within the meaning of this statute? Is it the effect which rate or charge has upon the seller, or which it has on the purchaser, which renders it reasonable or unreasonable?"

The same was held by the District Judge for the Eastern District of Missouri, in the case of United States v. Cohen, 264 Federal 218, wherein the Court used the following language:

"The definitions, boundaries, and limits of a criminal statute ought, at least, to be so clear that no man in his right mind can be in doubt when he is violating and when he is not violating such statute. There ought not to be necessary any chopping of logic or intricate reasoning from cause to effect in order to decide the question of criminality.

If this law is to stand, then no longer would there seem need of defining crimes by separate statutes. All that will be necessary will be to pass a single sweeping statute, declaring that any person who shall commit any unjust or unreasonabl act, or a wrongful or criminal act, shall be deemed guilty of a felony, and leave it to the jury to determine what is unjust, or unreasonable, wrongful, or criminal.

Neither is justification for the indefiniteness and uncertainty which inhere in the statute under discussion to be found in any alleged necessity to mitigate a present and crying evil, which all right-thinking men must deprecate and abhor; for it would seem that it might simply have been declared that a sale of any

necessity for a stated percentage increase in price beyond cost and carriage should be a punishable crime. At least such a law would not be objectionable on the ground here urged. That it would have been arbitrary may be conceded. But the statute here is just as arbitrary, and to its arbitrariness is added an indefiniteness, vagueness and uncertainty which is dangerous, beyond excusing, to the property and liberty of innocent men."

The attention of the Court will doubtless be directed to the case of Standard Oil Co. v. United States, 221 U. S. 106, 31 Sup. Ct. Rep. 502, 55 L. Ed. 619; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. Ed. 417; Nash v. United States, 229 U. S. 373, 33 Sup. Ct. Rep. 780, 57 L. Ed, 1232; and the following distinguishing ear-marks are present:

(a) The statutes dealt with terms having a fixed common law meaning;

(b) As to whether or not an agreement was in restraint of trade, or in violation of the statute under construction was a judicial question presented to the court for its determination, and not to a jury, as in the present case;

(c) The facts constituting a violation of the statute in one locality would also be a violation in every other locality where the statute was enforceable; whereas, in the present instance all three essentials of certainty are lacking;

(1) The terms "unjust and unreasonable charge" have no fixed and definite meaning at common law;

(2) The question is not a judicial question for the determination of the court, but it would devolve upon the jury to determine the facts necessary to contsitute the crime, as well as to whether or not the acts constituting the crime had been committed;

(3) An act committed in one portion of the state would not be punishable in another portion, or the same might apply to different acts in one and the same community.

In the case of United States v. Cohen, supra, District Judge Faris used the following language:

"The case of Standard Oil Co. vs. United States, supra, was a civil proceeding by injunction and for dissolution into its constitutent elements for monopolization and restrain of trade, and it was not a criminal proceeding, such as is this at bar. The statutes upheld in the Standard Oil Case upon an attack analogous to this (or so far analgous as a civil case may be to a criminal one) were sections 1 and 2 of the so-called Sherman Anti-Trust Act. Section 1 and 2, Act of July 2, 1890, c. 647, 26 Stat. 209 (comp. Stat. Sections 8820, 8821). These section denounced and declared unlawful all monoplies and combinations and conspiracies in restraint of trade. Aiding the view taken in the above case by the Supreme Court of the United States, reliance to a large extent was had upon the ancient common-law definitions and crimes of engrossing and monopolizing. Since the above case was not a criminal one, but a civil action, no occasion arose therein for any reference to, or consideration by either court or counsel of, the provisions of the Sixth Amendment to the Federal Constitution, and none such was made.

Neither was the case of Waters-Pierce Oil Co. v. Texas, supra, a criminal case, but a civil case in the nature of quo warranto. The trial thereof in the Texas state courts was had under certain statutes of that state, which provided as punishment for the violation thereof ouster and the assessment of certain penalties. Not the Sixth Amendment, but that phase of the Fourteenth Amendment touching due process of law, was alone involved. Water-pierce Oil Co. v. Texas, supra, 212 U. S. loc. cit, 111, 29 Sup. Ct. Rep. 220, 53 L. Ed. 417. While the attack involved the alleged vagueness and indefiniteness of the Texas statutes, these statutes clearly defined a monopoly. Waters-Pierce Oil Co. v. Texas, supra, 212 U. S. loc. cit. 99, Sup. Ct. 220, 53 L. Ed. 417. For the rest, what is said

touching the Standard Oil Case, supra, applies also to the Waters-Pierce Case.

The case of Nash v. United States, supra, was, however, a criminal case under Sections 1 and 2, supra, of the Sherman Anti-Trust Act. The indictment in the Nash Case was in two counts, one of which charged a conspiracy in restraint of trade, and the other a conspiracy to monopolize. It may or may not be a suggestive feature that there was originally also a third count which charged Nash with monopolization. This count was held to be bad on demurrer below and thereafter fell out of the case.

In the course of the opinion in the Nash case, it was pointed out that no overt act—nothing, indeed, beyond the bare conspiracy itself—need be either charged or proven; that the Sherman Anti-Trust Act punishes the conspiracies at which it is leveled on the common-law footing, and therefore does not make the doing of any act other than the act of conspiracy itself a condition of liability. Thus the Supreme Court justified the statutory crimes and conspiracies to monopolize, and conspiracies in restraint of trade, which are denounced by the Sherman Act, by a relegation for their constituent elements back to the common-law definitions of the crimes of engrossing, monopolies, and contracts in restraint of trade. 3 Coke Inst. 181, c. 85; 1 Hawkins, P. C. c. 29; 5 and 6 Edw. VI, c. 14; Standard Oil Co. v. United States, 221 U. S. loc. cit. 51, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834; Ann. Cas. 1912D, 734. Just here the quary may logically arise as to where at common law is there any crime defined or denounced as 'making an unjust or unreasonable charge in dealing in any necessary?'

After the Nash Case was rule, the Supreme Court of the United States again had occasion to refer to it, and distinguished it, in a case arising under the Constitution and laws of the State of Kentucky. International Harvester Co. v. Kentucky, 234 U. S. 216, 34 Sup. Ct. 853, 58 L. Ed. 1284. Plaintiff in error in the above

case was convicted and fined in the courts of the state of Kentucky under certain statutes passed, pursuant to provisions of the Kentucky Constitution, which permitted the Legislature to enact such laws as might be necessary to prevent all trusts 'from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value.' The statutes passed by the Legislature of Kentucky made it unlawful to enter into any combination for the purpose of controlling prices, 'unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article.' The Supreme Court of the United States held that neither the Constitution of Kentucky, nor the statutes above referred to, and passed pursuant to the Constitution, offered any standard of conduct that it is possible to know in advance and comply with, and that such provisions, as a consequence, were invalid. International Harvester Co. v. Kentucky, 234 U. S. 223, 34 Sup. Ct. 853, 58 L. Ed. 1284.

Distinguishing the Nash Case from what was said in the International Harvester Case, the Supreme Court said:

"We regard this decision as consistent with Nash v. United States, 229 U. S. 373, 377 (33 Sup. Ct. 780, 57 L. Ed. 1232), in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree, what is an undue restraint of trade. That deals with the actual, not with an imaginary, condition other than the facts. It goes no further than to recognize that, as with negligence, between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach, and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust. The conditions are as permanent as anything human, and a great body of precedents on the civil side coupled with familiar practice makes it comparatively easy for com-

mon sense to keep to what is safe. But, if business is to go on, men must unite to do it, and must sell their wares. To compel them to guess, on peril of indictment, what the community would have given for them if the continually changing condition were other than they are, to an uncertain extent, to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess. 234 U. S. 223, 34 Sup. Ct. 855, 58 L. Ed. 1284.

While no reference was made by the Supreme Court in the above excerpt to the fact that common-law crimes (which form the very foundation stones of the offenses denounced in the Sherman Anti-Trust Act) were being dealt with in the Nash Case, it is yet clearly obvious that the distinguishing features, as between the two classes of cases, bring this case into that class represented by the Kentucky statutes, rather than the common-law class represented by the Nash Case. Indeed, upon principle, I am unable to distinguish the instant case from the Kentucky case. No man would engage in business, and no self-respecting man would remain in business, if his fortune, good name, or liberty is to be determined solely by the heated and prejudiced views of what is unjust and unreasonable, which may be entertained by a jury personally embarrassed and harrassed, it may be, by the inordinate rise in prices of all commodities. Such a law may be fit for the trial of the guilty; but laws ought to be fit both to try the guilty and the innocent. A law which is fit only to try those who are guilty necessarily begs the question of guilt, and is therefore no better than lynch law."

IV.

THE ACT IS UNCONSTITUTIONAL, IN THAT CERTAIN OCCUPATIONS ARE EXEMPT FROM ITS OPERATION.

Section 2 of the Act of October 22, 1919, contains the following provision:

That this Section shall not apply to any farmer, gardner, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, in respect to the farm products produced or raised upon lands owned, leased, or cultivated by him."

We respectfully submit that this provision invalidates the entire Act. It is elementary that criminal statutes should be universal in their application. The direct question was decided in this Court in the case of Connolly v. Union Sewer Pipe Co., 184 U. S. 540. The Court in that case was construing an Illinois statute condemning trusts and combinations, which exempted from its operation agricultural products or live stock while in the hands of the producer or raiser. This Court, in the strongest language, condemned and held invalid any such statute, using the following language:

"Returning to the particular case before us, and repeating or summarizing some thoughts already expressed, it may be observed that **if combinations of capital, skill or acts, in respect of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and lixe stock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statuate, criminal, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturists and live stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the presribed penalty.** Under what rule of permissible classification can such legislation be sustained as consistent with

the equal protection of the law? It cannot be said that the exemption made by the ninth section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that State."

V.

NO CRIMINAL PROSECUTION CAN BE BASED UPON THE ACT BY REASON OF THE FAILURE OF COMPLAINANTS TO CONFORM TO THE PRICES FIXED BY THE FAIR PRICE COMMISSIONERS. A MERE DEPARTMENTAL RULING, ORDER OR REGULATION CANNOT BE MADE THE BASIS OF A CRIMINAL PROSECUTION, UNLESS EXPRESSLY SO PROVIDED BY STATUTE.

The bill of complaint alleges that the State Fair Price Commissioner and City Fair Price Commissioner have fixed a certain basis of profit to which complainants in error are expected and required to conform the operation of their businesses. The proclamation will be found on pages 10 and 11 of the Transcript.

It is shown by the allegations of the bill of complaint that the margin of profit fixed by the Fair Price Commissioners in no case exceeds thirty-three and one-third per cent gross profit. The allegations of the bill of complaint are that on the previous year's business the complainants, while conducting their business on a higher basis of profit, probably about fifty per cent gross profit, were only able to make a net profit of about five per cent. (See original bill of complaint, pp. 20 and 21).

And the bill of complaint alleges that if the plaintiffs in error were obliged to conform to the margin of profits fixed by the defendants in error, that the business would be confiscated, and alleges, which allegations are admitted in this proceeding, that unless the plaintiffs in error adopt

the confiscatory basis of profits fixed by the Fair Price Commissioners and conform their business thereto, that they would be arrested, indicted and prosecuted, because they had violated a rule as to the margin of profit prescribed by the Fair Price Commissioners.

And the bill alleges, and it is admitted in this proceeding, that they will be prosecuted for violating the regulations of the Commissioners. It is academic law that a mere department rule is not law, and that its violation cannot be made the basis of criminal prosecution, unless expressly so provided by statute.

The identical question was decided by the Supreme Court of the United States in the case of the United States v. Eaton, 36 L. Ed 591. In that case the United States statute provided for a tax on oleomargarine, and provided that the Secretary of the Treasury should make all proper rules and regulations for the collection of the tax, and provided criminal punishment for failure to comply with any duty imposed by law in respect thereto. The Department issued a regulation that the dealer keep a complete set of books in order that the amount of the tax might be readily ascertained and to make certain returns. This the dealer refused to do and was indicted for failure to comply with the regulation. The Supreme Court of the United States held that Congress, by express legislation, not having made violation of the regulation a crime, no crime was committed, using the following language:

> "It was said by this Court in Merrill v. Jones, 106 U. S. 466, that the Secretary of the Treasury cannot by his regulations alter or amend a revenue law, and that all he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. Accordingly, it was held in that case, under Section 2505 of the Rev. Stat., which provided that live animals specially imported for breeding purposes from beyond the seas should be admitted free of duty, upon proof thereof satisfactory to the Secretary of the Treasury, and under such regulations as he might prescribe, that he had authority to prescribe a regulation requiring

that, before admitting the animals free, the collector should be satisfied that they were of superior stock, adapted to improving the breed in the United States.

Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed, or omitted, in violation of a public law, either forbidding it or commanding it.

It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the Oleomargarine Act, for carrying it into effect, could be considered as a thing 'required by law,' in the carrying on or conducting of a business of a wholesale dealer in Oleomargarine, in such a manner as to become a criminal offense punishable under Section 18 of the Act; particularly, when the same act, in Section 5, requires a manufacturer of the article to keep such books and render such returns as the commissioner of internal revenue with the approval of the Secretary of the Treasury, may, by regulation, require, and does not impose, in that section, or elsewhere in the act, the duty of keeping such books and rendering such returns upon a wholesale dealer in the article.

It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for the wholesale dealer in oleomargarine to omit to keep books and render returns, as required by regulations, to be made by the commissioner of internal revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in Section 41 of the Act of October 1, 1890.

Regulations prescribed by the President and by the heads of departments, under authority granted by

Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

The question was again presented in the case of United States v. Maid, 116 Fed. 650. In that case the defendant was indicted for perjury in making a homestead entry. He was required by the department which had authority to make rules and regulation concerning entry of land to make an affidavit that the lands were not mineral lands. He made such an affidavit, which was false, and was indicted thereon. The court held that there was no crime committed because the act of Congress did not require that the affidavit in question be made, using the following language:

"Thus it will be seen that the contest before the local land officers, by reason of which the supreme court of the United States in Caha v. U. S., supra, held such officers to be a competent tribunal, within the scope of Section 5392, although originally provided for in department regulation, had frequent recognition by acts of Congress. In the case at bar, materiality of the affidavit set out in the indictment and its authorization by a law of the United States, are essential elements of the crime sought to be charged. To hold that said elements exist when there is no statutory requirement or authority for the affidavit, and solely because of Rule 24, above mentioned, assuming now that said rule is not repugnant to any act of Congress, would make the rule a part of the law defining perjury, and thus admit what all the authorities deny,—legislative power in the executive branch of the government. Whether or not the indictment is sufficient in failing to allege that the lands in question contained valuable mineral deposits it is unnecessary to determine

in view of the conclusion above announced. The jurisdictional objects to the indictment are not well taken. See opinion filed this day in U. S. v. Peuschel, (D. C.) 116 Fed. 642."

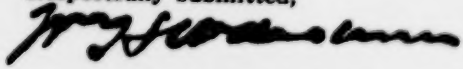
VI.

INJUNCTION THE PROPER REMEDY.

The statutes being unconstitutional, it necessarily follows that injunctions prayed for should have been granted. Ex parte Young, 209 U. S. 123, 52 L. Ed. 174; Western Union Telegraph Co. v. Andrews, 216 U. S. 165, 54 L. Ed. 430; Philadelphia Co. v. Stimson, 223 U. S. 607, 56 L. Ed. 572; Traux v. Raich, 239 U. S. 33, 60 L. Ed. 131.

We respectfully submit that the decree of the Court below should be reversed, and the cause remanded, with directions to issue the injunction prayed for.

Respectfully submitted,



Counsel for Plaintiffs in Error.